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September 14, 1995

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Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N. W.
Washington, D. C. 20554

FEDERAL COMMUNICATIONS COMMISSION

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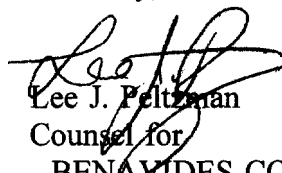
Re: MM Docket No. 95-74
Amendment of Section 73.202(b)
FM Table of Allotments
(Benavides, Bruni, and Rio Grande City, Texas)

Dear Mr. Caton:

Transmitted herewith, on behalf of Benavides Communications, petitioner in the above-referenced rule making proceeding, is an original and four (4) copies of its Reply Comments in the above-referenced rule making.

Should questions arise concerning this filing, please communicate with this office.

Sincerely,


Lee J. Peltzman
Counsel for

BENAVIDES COMMUNICATIONS

Enclosure

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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of:

Amendment of Section 73.202(b)
FM Table of Allotments
(Benavides, Bruni, and Rio Grande City, Texas)

MM DOCKET NO. 95-74
RM-8579, 8690

To: Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

REPLY COMMENTS

Benavides Communications ("BC"), permittee of Station KXTM(FM), Benavides, Texas, by its attorney, hereby respectfully files its Reply Comments in the above-captioned rule making with respect to the counterproposal filed by Sound Investments Unlimited, Inc. ("Sound Investments"), licensee of Station KCTM(FM), Rio Grande City, Texas. In support of its position, BC states as follows:

By Notice of Proposed Rule Making, DA 95-1145, released June 1, 1995 ("NPRM"), the Commission proposed to amend its Table of Allotments to reallocate Channel 299C2 from Benavides to Bruni pursuant to Section 1.420(i) of the Commission's rules and also to allot Channel 254A to Benavides, Texas, as a new replacement channel. The NPRM additionally proposed the concurrent modification of Station KXTM(FM)'s construction permit to specify Bruni as the station's community of license.

Comments in support of the Commission proposal were filed by BC which established that Bruni had sufficient indicia to qualify as a "community" for Commission allotment purposes and that the proposed change of community would serve the public interest. A set of Comments and Counterproposals was filed by Sound Investments, proposing the substitution of Channel 298C2

for Channel 276A at Rio Grande City while retaining Channel 299C2 at Benavides, or, alternatively, proposing the allotment of Channel 298C2 to Rio Grande City, Channel 299C3 to Bruni, and Channel 254A to Benavides.^{1/} By Public Notice, dated August 30, 1995, the Commission accepted Sound Investments' counterproposal (Report No. 296) and requested that reply comments be filed with respect to the counterproposal.

In comparing the relative needs of Bruni for first transmission service and Rio Grande City for expanded service, the Commission is guided by the allotment priorities set forth in its Revision of FM Assignment Policies and Procedures, 90 FCC 2d 88 (1982). In that decision, the Commission adopted certain criteria to be used when comparing rule making proposals:

- (a) first full-time aural service
- (b) second full-time aural service
- (c) first local service
- (d) other public interest matters

[the provisions of second aural service and first local service are treated co-equally.]

In this case, the allotment of Channels 299C2 to Bruni and 254A to Benavides will provide a first local service to Bruni and preserve a first local service at Benavides, thus, fulfilling priority three. On the other hand, the proposal of Sound Investments to substitute Channel 298C2 for Channel 276A would be considered under priority four.

The Commission has long held that the provision of a first local service is generally preferred over the provision of expanded service for an existing station.

[T]he basic issue becomes the choice that must be made between

^{1/} In subsequent Reply Comments, Sound Investments withdrew its latter proposal.

a proposal to initiate a new primary service represented by a new allotment and a proposal to modify an existing license. We therefore take this opportunity to state our policy regarding the action to be taken when a new allotment and modification proposal are in conflict. Generally, a modification of license to upgrade facilities to a superior channel is regarded as an increase in existing service which does not provide as great a public benefit as that of a new primary service.

Benton, Arkansas, 2 FCC Rcd. 1963, 1966 (1987). See also Cape Girardeau, Missouri, DA 95-1914, released September 12, 1995, at para. 6; Lafayette, Tennessee, 6 FCC Rcd. 3289 (1991). Thus, Bruni is afforded the higher priority and must be preferred over the Sound Investments' proposal, since it will result in a first local service to the community of Bruni. See Epworth, Iowa, 7 FCC Rcd. 106 (1992).

Nor can it be seriously argued that Bruni is undeserving of community status. Bruni possesses the necessary indicia to be considered a community for Commission allotment purposes. The Commission has held that indicia of community status need not be overwhelming, nor very extensive, and that the burden is not to be considered "too stringent." See Kenansville, Florida, 5 FCC Rcd. 2663 (1990), affirmed, FCC 95-332 (Commission, September 11, 1995) at para. 12; Beacon Broadcasting, 2 FCC Rcd. 3469, 3470 (Commission), affirmed, 2 FCC Rcd. 7562 (Commission, 1987); Seven Locks Broadcasting Co., 37 FCC 82 (Commission, 1964). In this case, the evidence submitted by BC previously in its July 24 Comments and August 8, 1995, Reply Comments readily demonstrated that Bruni is a geographically identifiable population grouping.

The Commission's policy is that, if a community is neither incorporated nor listed in census reports, then the proponent of the allotment must show the place to be a geographically identifiable population grouping. The proponent must show that residents of the locality are

commonly regarded as a distinct group. This can be proven by the subjective "testimony of local residents or by objective indications of the existence of a common perception that a locality's populace constitutes a distinct geographical population grouping." Beacon at 7562. Examples of objective indications of community status include the existence of social, religious, and commercial organizations and services in the community. Another indication of community status is whether the residents function as and conceive of themselves as residents of a community around which their interests coalesce. Implementation of BC Docket No. 80-90, 5 FCC Rcd. 934 (1990).

In this case, BC has previously established Bruni's existence as a community through both objective and subjective evidence. BC presented objective evidence of indicia of community status.^{2/} It also provided a statement from over 120 Bruni residents showing that these residents function as and conceive of themselves as residents of the community of Bruni, Texas, and that they share common interests and needs, including the need for a communication outlet, as Bruni residents.

Accordingly, for the reasons stated above, and consistent with binding Commission precedent, the Commission must favor the proposal for new service proposed by BC over that

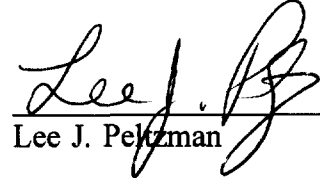
^{2/} The Commission has never required a municipality to provide every municipal service in order to merit a finding of community status. Thus, for example, the absence of local government, a newspaper, or a bank is not fatal to BC's claim. See Implementation of BC Docket No. 80-90 at 935; Kenansville, Florida, *supra*, 5 FCC Rcd. at 2664. Additionally, the fact that Bruni has a relatively small population (375 individuals) does not disqualify it as a community, since the Commission has on a number of occasions allotted radio or television channels to communities with similar or even lesser populations. See e.g. Kenansville, Florida, *supra* (population found to range from 170 to 450 individuals); Implementation of BC Docket No. 80-90, *supra* (community of Seamora, North Carolina, had an estimated population of 150 individuals); Seven Locks Broadcasting Co., 37 FCC at 83 (existing communities with as few as 30 persons have received allotments).

of expanded service contained in the counterproposal filed by Sound Investments. Therefore, BC requests that the Commission adopt its proposal to reallocate Channel 299C2 from Benavides to Bruni, modify the authorization issued to Station KXTM(FM), and allot a new Channel 254A at Benavides, Texas. As stated in earlier pleadings, BC will file an application for modification to implement the reallocation to Bruni as well as file an application for a new construction permit at Benavides and, upon Commission grant of those applications, immediately construct and operate both Station KXTM(FM) on Channel 299C2 at Bruni, as well as its Benavides facility.

Respectfully submitted,

BENAVIDES COMMUNICATIONS

By:



Lee J. Peltzman

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September 14, 1995

CERTIFICATE OF SERVICE

I, Linda E. Skiles, Office Administrator, of the law firm of Shainis & Peltzman, do hereby certify that copies of the foregoing document were sent, via First Class Mail, this 14th day of September, 1995, to the office of the following:

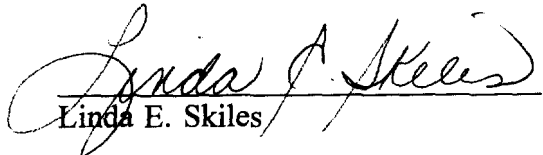
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